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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1020

JARKA CORPORATION,

Petitioner,

v.

MITSUI SEMPAKU K. K.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JARKA CORPORATION,

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v.

MITSUI SEMPAKU K. K.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Jarka Corporation, petitioner, prays that a writ of certiorari be issued to review so much of the judgment of the United States Court of Appeals for the Third Circuit, as of No. 17,113, as affirmed the right of respondent (the ship) to recover a money judgment from petitioner (the stevedore).

OPINIONS BELOW.

The opinion of the Court of Appeals is not yet reported. The opinion of the trial judge is reported in 266 F. Supp. 961 (E. D. Pa. 1967).

JURISDICTION.

The judgment sought to be reviewed was entered December 31, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Is the scope of a stevedore's implied warranty of workmanlike service a question of fact for the jury or of law for the court?

2. Does a ship owe a duty of due care toward its stevedore which the fact-finder may take into account in deciding what service the stevedore has undertaken and what warranty he has impliedly given?

3. Where the jury finds that both the ship and the stevedore are "at fault" for a shipboard accident, should the jury be told to return a verdict for full indemnity against the stevedore, even if the jury believes that the ship's liability to the injured longshoreman resulted from the ship's own fault and not from the stevedore's breach of warranty?

4. Should a stevedore have to indemnify a ship for that portion of the ship's damages not resulting from the stevedore's breach of warranty?

5. Is a ship's suit for indemnity from a stevedore-employer prohibited by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 905, where, unlike the indemnity cases decided by this Court, there is no breach of warranty independent of injury to a longshoreman?

6. If a ship allows a judgment in favor of a longshoreman to be entered against it without interposing a good faith defense, does it lose its right to indemnity?

7. Is a stevedore entitled to a jury trial on the fact issue whether the ship defended in good faith?

CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED.

AMENDMENT 7, CONSTITUTION OF THE UNITED STATES, U. S. C. A.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

* * *

SECTION 5, LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 44 Stat. 1426, 33 U. S. C. § 905

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

STATEMENT OF THE CASE.

This was a longshoreman v. ship v. stevedore personal injury case tried to a jury in the Eastern District of Pennsylvania. There was civil diversity jurisdiction applying the law of admiralty.

The plaintiff-longshoreman claimed that he was injured (scalp laceration followed by neurosis) on the defendant ship when a scraper (a hand tool resembling a flat-end hoe) used by the longshoreman next to him bounced off sugar which was "regular rock, like cement" (19a, 164a) [1] and hit him on the head. He claimed, inter alia, that the ship was negligent and/or unseaworthy in allowing its cargo to become so caked and hard on the sides of the hold where bulk sugar was transported that it constituted a danger to the longshoremen who eventually had the duty of scraping the residue of sugar from the sides of the hold after the bulk sugar was removed by a clam bucket. The jury found the ship liable. The longshoreman's judgment has been satisfied and he is no longer an interested party.

In its indemnity suit the ship, which joined the stevedore as a third-party defendant after the pre-trial conference (1a-2a), claimed that the stevedore was unworkmanlike in a plethora of rather trivial ways.[2] The stevedore said that it acted reasonably in every respect and that the longshoreman's injury was due fundamentally to the unsafe condition of portions of the ship's stow which the stevedore-employer did not know about before the accident.

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1. References in this petition such as (5a) are to the corresponding pages in Appellant's Appendix in the Court of Appeals, a copy of which is part of the certified record. References such as (5 app) refer to the corresponding page of the appendix to this petition.

2. It removed too much bulk sugar before scraping; it failed to inspect the scrapers; the scrapers weren't sharp enough; the handles were too short; the men worked too close together; the men did not wear hard hats (3 app).

The jury, which was charged separately in the indemnity action, came back from the jury room with this inquiry (186a):

> "If we feel that both parties are at fault, who is liable?"

The trial judge asked counsel for their positions. Counsel for the stevedore stated his as follows (186a):

> "My position, Your Honor, is they should decide what fault is the basic cause of this particular accident. If the ship was at fault because of the stow, was the stow the basic cause of the accident.
>
> If the stevedores were at fault because of the way that they worked it, was the way they worked it the basic cause of the accident?
>
> Since there is no joint tort-feasor system in admiralty law they have to pick one or the other. They are stuck with the question of what is the cause of it."

The ship's counsel said (186a):

> "I think they should be told that even though there might be unseaworthiness or negligence which would render the ship liable, nevertheless . . . *if any one of those acts* of the stevedore was of substandard performance and therefore a breach of the implied warranty that they still should find only against the stevedore . . ." (Emphasis supplied.)

The trial judge described his answer to the jury's question as follows (245a):

> "The jury was instructed that where both parties were at fault, if the stevedore's breach was a contributing cause of the injury it was liable to the ship."

The stevedore objected to the charge because it was in effect a directed verdict for the ship, giving the jury no chance to find for the stevedore whatever the jury's view of the facts (191a-192a).

The Court of Appeals for the Third Circuit, saw that the charge required the jury to find against the stevedore if any substandard performance was *a* contributing cause of the plaintiff's injury, even if the jury was convinced that "the stevedoring company's breach of warranty contributed . . . as little as five to ten percent" to the ship's liability (4 app). Neverthless the court affirmed the indemnity verdict against the stevedore:

> "The law of indemnity is not concerned with the comparison or degree of fault of the shipowner and the stevedoring company." (8 app)

The charge given was "more favorable than that to which [the stevedore] was entitled" (5 app).

Counsel for the stevedore had requested the court to charge the jury (180a)

> ". . . on the ship's obligation to give the stevedore a reasonably safe ship to start its operation".

The court had refused to cover that point. The Court of Appeals affirmed (7 app).

During the trial it became apparent (at least to counsel for the stevedore) that the ship, instead of asserting the defenses raised in the pre-trial pleadings and documents, was helping plaintiff to establish the ship's liability in exchange for plaintiff's introducing evidence which would implicate the stevedore. The stevedore's counsel asked leave to assert, as a defense to the indemnity claim, that the ship was not defending in "good faith" (78a). Each pro-

cedural motion to get that fact issue before the jury was denied. Post-trial motions preserving the point were denied. The Court of Appeals held that disposition of the motions lay within the trial judge's discretion. Thus, the stevedore has been denied a trial on the *fact issue* of "good faith".

REASONS FOR GRANTING THE WRIT.

1. There is a conflict between the circuits:

(a) *The Ninth Circuit Rule*—The shipowner must present the stevedore a ship reasonably safe for unloading or must warn of dangers known or which should have been known: *Hugev v. Dampskisaktieselskabet International, et al.*, 274 F. 2d 875 (9th Cir. 1960), affirming 170 F. Supp. 601.

(b) *The Fifth Circuit Rule*—". . . the trier of fact must weigh the substantiality of the fault of the shipowner against the breach of warranty by the stevedore to determine whether the former's conduct is 'sufficient to preclude indemnity'." *Southern Stevedoring & Contract Co. v. Hellenic Lines, Ltd.*, 388 F. 2d 267, 271-2 (5th Cir. 1968).

(c) *The Third Circuit Rule*—Relative fault is *not* to be considered. The jury is *not* to be told that the ship owes the stevedore any obligation at all.

2. Awaiting decision in this court (argument was held January 15, 1969) is a case which involves one aspect of the above conflict, *Federal Marine Terminal v. Burnside Shipping*, current docket No. 291, certiorari from 392 F. 2d 918 (7th Cir. 1968) (hereafter called "the *Federal Marine* case").

3. The Third Circuit rule that the stevedore must repay the ship all damages awarded a longshoreman however little the stevedore's breach of warranty contributes to a liability caused by the ship itself, conflicts with the applicable decisions of this court. It conflicts also with the Fifth Circuit rule quoted above.

4. Attempts by the lower courts to resolve the "relative fault" dilemma have caused great confusion in waterfront litigation. The substantial economic burden that such confusion thrusts on stevedoring companies, many of which are small indeed compared with their shipping counterparts, is devastating. The confusion can be resolved simply and fairly. This court should settle this important question of federal law.

5. The lower courts have broadened the scope of the stevedore's warranty too far, permitting recovery not required by the decisions of this Court and prohibited by the Longshoremen's Act.

6. Deprivation by the courts below of the stevedore's right to trial by jury of a fact issue, under the guise of denying "discretionary" procedural motions, is such a departure from Constitutional due process as to call for an exercise of this Court's power of supervision.

ARGUMENT AMPLIFYING REASONS FOR GRANTING THE WRIT.

1. The Problem in General.

Waterfront litigation is the victim of a most common judicial weakness, the inability to give unto the fact finder the things that are his. Compounding that fundamental failure in the operation of the system is confusion about the underlying law.

The fundamental law stems from *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956). It may be fairly summarized as follows:

> Where the ship holds a stevedore's agreement to perform a stevedoring service the stevedore impliedly promises to complete the service in a workmanlike way, i.e. "properly and safely", and to pay the ship the "foreseeable damages resulting to the shipowner from the contractor's improper performance." (350 U. S. at p. 129).

This legal rule raises certain *fact issues:*

1. What service has the stevedore undertaken?

2. Was his performance of that service workmanlike?

3. What damages resulted to the shipowner from the stevedore's improper performance?

In the Third Circuit, as demonstrated by the present case, the court decides *fact issue* No. 1, the jury decides No. 2, and the court decides No. 3. We submit that this court's decisions do not permit, let alone require, such a constricted view of the function of judge and jury in waterfront litigation.

2. Judge Ganey's Opinion and the Conflict Between the Circuits.

Judge Ganey's opinion that the fact-finder need not be instructed that the ship owes a duty to the stevedore (7 app) is a manifestation of the Third Circuit's philosophy that the scope of the stevedore's undertaking is a legal, not a factual matter. We submit that the approach is wrong. It is for the jury to say, in light of all the circumstances, what service the stevedore has undertaken to perform. In the present case did he agree to unload the ship,[3] or did he agree merely to unload bulk sugar from the ship? Was plaintiff hurt when a fellow longshoreman, thinking he was removing sugar, used his sugar-scraping tool on "regular rock, like cement" (19a, 164a)? If so, was removal of "cement" part of the stevedoring service?

In the present case the stevedore thought there was no evidence at all that he had undertaken to remove "cement". Since he conceived it to be the ship's duty to prove, either expressly or by implication, that he had undertaken to do so (on what other basis could the ship assert a claim for breach of contract?), the stevedore moved for a directed verdict (132a). The court denied the motion. Then to give *the jury* some basis for resolving the scope of the stevedore's undertaking, counsel asked the court to charge on the ship's duty, i.e., what the stevedore could reasonably expect from the ship (180a). The court refused. The Court of Appeals

3. In *Ryan Stevedoring v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133 (1956), the ship held the uncontroverted agreement of the stevedore "to perform all the shipowner's stevedoring operations," and there was no issue about the scope of the agreement for the fact-finder to resolve. In many cases, however, the stevedore's undertaking may not be so broad—a ship-cleaner, for instance, may contract merely to remove dunnage or to sweep a single deck or a single hold. Fact-finders, not presiding judges, must in such instances determine the scope of the undertaking, a necessary antecedent to the question whether the stevedore went about it in a competent way.

affirmed (7 app). Thus, the jury never did consider the case in light of reciprocal obligations and was never given the chance to resolve a fundamental *fact issue,* did the stevedore undertake to remove "cement"?

This type of factual dispute is fundamental in much of the waterfront litigation. Fair resolution of such fact issues is impossible unless the fact-finder is instructed on the mutual legal obligations of the ship and stevedore and permitted to apply the law to the particular circumstances of each case. The Ninth Circuit and the Fifth Circuit recognize mutual legal obligations. The Third Circuit does not. This court should resolve the conflict.

3. The Conflict Between the Circuits—Will It Be Resolved by This Court's Decision in the Federal Marine Case?

As the writer understands the *Federal Marine* case, this court will decide whether a stevedore's complaint against a ship, based on an implied warranty that the ship will be reasonably safe when turned over to the stevedore, states a cause of action for recovery of indemnity. If it does, the judgment in the instant case is wrong since it is predicated upon a jury charge which denied that the ship owed a duty of reasonable care to the stevedore. Therefore, if the *Federal Marine* case is reversed, and this court indicates in the process that such a duty is owed, the least that should be done in the instant case is to remand it to the Court of Appeals for reconsideration in light of that opinion.

If this court affirms the judgment in the *Federal Marine* case, the present conflict may or may not be resolved. In the event of a decision which leaves the question open, certiorari should be granted in this case to resolve the conflict.

4. Judge Ganey's Opinion and the Problem of "Causation".

In *Ryan*, *supra*, p. 10, this court said that indemnity could be imposed for damages "resulting from" a stevedore's breach of warranty. 350 U. S. at page 134. This court has also said that indemnity may be adjudged where the breach has "led to" the ship's liability. *Weyerhaeuser S. S. Co. v. Nacirema Operating Co., Inc.*, 355 U. S. 563, 567 (1958). Ultimate liability is to rest "on the company whose default caused the injury." *Reed v. The Yaka*, 373 U. S. 410, 414 (1963). The party in the "better position" to avoid the accident shall bear the loss. *Italia Soc. v. Oregon Stevedoring*, 376 U. S. 315, 322-23 (1964).

In spite of these clear directional signals, the Third Circuit has now removed from the jury's consideration the *fact issue* of "causation". In the present case the jury apparently decided that the ship was "at fault" (188a). That conclusion undoubtedly resulted from the testimony that sugar too hard for removal by the standard scrapers was a rare thing indeed; in only two hatches out of fifty ships (i.e., in one hold out of 125) would the sugar at the bottom of the hold be so hard that picks were necessary to chop it loose (113a-114a). Since the ship chose to introduce no evidence at all about this particular stow of sugar, no explanation why it had become so unmanageable in spots, the jury undoubtedly drew the permissible inference that the ship had no valid explanation for the condition of the stow. Accordingly they found "fault" (negligence, unseaworthiness or both) on the ship's part. The jury could also have decided that the stevedore did nothing wrong in its operation except that it should have equipped its men with hard hats. Failure to do so was a breach of warranty, although the ship was neither negligent nor unseaworthy in that respect.[4] If this is what the jury found, the accident

4. There is no guarantee, of course, that these were the precise findings the jury made, but they are plausible conclusions from the

and hence the liability, was "due to", or "resulted from" the ship's own fault. The ship, and only the ship, was in a position to have avoided the accident. The stevedore's breach of warranty may have contributed to the injury, but there is no way on this record to determine whether the jury would have considered that contribution a greater or a lesser factor in the damage picture than the ship's own contribution.[5]

The lower court in effect directed a verdict for the ship:

> "The jury was instructed that where both parties were at fault, if the stevedore's breach was a contributing cause of the injury it was liable to the ship." (245a)

Under the Third Circuit's opinion in *Dziedzina v. Dolphin Tanker Corp.*, 361 F. 2d 120 (1966), that charge was probably correct. In *Dziedzina* the Third Circuit had taken a major step toward turning this court's decisions into a rule that the stevedore must pay indemnity where his breach of warranty merely contributes to the ship's liability. The Third Circuit adopted the view that indemnity (i.e., repayment of *all* damages and expenses paid by the ship for a given liability) should be awarded where a breach of warranty is "a proximate cause" of the ship's liability. 361 F. 2d at p. 122. Every lawyer knows that a "con-

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evidence, permissible under the law, and therefore good assumptions with which to test the lower courts' legal theories about "relative fault." Judge Ganey did not look at the evidence this way (4, 5, 8 app), but the jury decides what the evidence proves, not the court.

5. Plaintiff's damages from the scalp laceration were minimal. His neurosis was his big claim. He could just as easily have suffered a disabling neurosis from a scraper's sliding off a hard hat and cutting his shoulder as from the mild injury he did get because he was bareheaded. Questions of this sort are, of course, strictly for the jury.

tributing factor" may well be found by a jury to be "a proximate cause" even if it contributes as little as 5% to 10% toward the ultimate liability. So the *Dziedzina* rule gave lawyers for the shipping companies a most effective tool for shifting responsibility for virtually all waterfront accidents to the stevedore:

> "Ladies and Gentlemen of the jury, if you believe that the stevedore's performance was substandard in any respect, you should find for the shipping company in this indemnity action. It is not necessary that the shipping company's liability resulted entirely from what the stevedore did; you don't worry about what part, if any, the shipping company's own fault played in causing this accident; you don't worry about which company was better able to avoid the accident. If you find merely that *a* breach contributed in a substantial way, and 'substantial' is what you in your good judgment say it is, then you should find against the stevedore."

In the present case, since the trial judge had charged the *Dziedzina* theory, that theory was attacked in the Court of Appeals as contrary to both the letter and spirit of this court's decisions.

> "Just as the Supreme Court pointedly avoided using negligence concepts in defining the scope of the stevedore's warranty, they also avoided the 'a cause' idea, or the 'a proximate cause' language, that is such a familiar part of tort law. They pointedly used non-tort phrases in defining 'cause' for warranty liability purposes. Necessarily, they had to steer clear of the loose tort idea of cause, for it is wholly inconsistent with the theory of indemnity, that a person who is re-

> sponsible for his own liability can recover indemnity from one who merely contributed to that liability."

The Court of Appeals did not retreat from *Dziedzina*. On the contrary Judge Ganey carried his *Dziedzina* opinion one step farther, holding that the charge of which the stevedore complained was "more favorable than that to which it was entitled" (5 app).[6] Simply stated, the Third Circuit's present position is that "causation" is not a fact problem at all. A breach of warranty either "causes or brings into play" the underlying liability of the ship, and the court may declare that as a matter of law without even submitting it to the jury. Thus, in this case, although the jury could have determined *as a matter of fact* that the stevedore's breach played only a small part in creating the ship's liability "as little as five to ten percent", the court declares as a matter of law that the liability "stemmed only from the conduct of the stevedoring company" (5 app). "Whatever condition or situation was the basis for liability of the shipowner to the plaintiff-longshoreman, the condition was brought into play or the situation was brought about by the stevedoring company" (8 app).

The Third Circuit's approach is clearly summed up by Judge Ganey:

> "The law of indemnity is not concerned with the comparison or degree of fault of the shipowner and the stevedoring company." (8 app)

That statement, we submit, conflicts squarely with both the letter and spirit of this court's holdings:

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6. Judge Ganey's statement that the stevedore's counsel did not object to the charge on cause was simply a mistake. The objection appears at 181a-182a. The stevedore's position concerning causation was stated in two other places, 186a, 192a.

> ". . . under *Ryan,* the burden ultimately falls on *the* company whose default *caused* the injury . . ." *Reed v. The Yaka, et al.,* 373 U. S. 410, 414 (1963).
>
> * * *
>
> ". . . liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." *Italia Soc. v. Oregon Stevedoring Co.,* 376 U. S. 315, 324 (1964).

How can the law of indemnity be blind to "comparison . . . of fault" and still allocate responsibility between ship and stevedore in a just way? Whether a breach of warranty *caused* a given liability is a *fact issue.* The jury resolves fact issues under our Constitution. Therefore, it is fundamentally wrong for the jury to be told that it is to find against the stevedore if the breach of warranty *contributed* to the ship's liability. That is not the standard. It is respectfully submitted that this court should now make that plain.

5. Confusion in the Lower Courts—Much of It Can Be Cured Easily and Fairly.

In an attempt fairly to allocate responsibility between ship and stevedore for waterfront accidents, and to use contract concepts in the process, the lower courts have developed solutions which are difficult to apply in a jury trial. The law is too conceptual. For instance:

> 1. The Third Circuit looks first for a breach of warranty. If found, the fact-finder can decide whether there was "any conduct on the part of the shipowner which was sufficient to wipe out its right to indemnification" (5 app). "Inducement or participation" in the breach may be sufficient (9 app). If this court will read the charge of the trial judge in the instant case

(177a-179a), it should see how perplexing that concept becomes.[7]

2. The Second Circuit has a doctrine that indemnity is owing unless the ship's conduct "prevent[s] or seriously handicap[s] the stevedore in his ability to do a workmanlike job." *Mortensen v. A/S Glittre,* 348 F. 2d 383 (2d Cir. 1965).[8]

3. Even the Fifth Circuit's "relative fault" doctrine, see *supra,* p. 8, is applied, not in a straightforward manner toward the question whether the liability "resulted from" the breach, or whether the breach "caused" the liability, but to test whether the stevedore has proved that the ship's conduct is "sufficient to preclude indemnity". The Second Circuit's approach is used as part of the test. *Southern Stevedoring & Contract Co. v. Hellenic Lines, Ltd.,* 388 F. 2d 267, 271-2 (5th Cir. 1968).

It is respectfully submitted that these complications are unnecessary; more than that, they are downright harmful. If the courts would simply submit the *fact issues* implicit in the *Ryan* rule (*supra,* p. 10), the jury could resolve

7. It is the writer's opinion that the trial judge, an exceptionally intelligent and perceptive man, did as well as anyone could with the elusive concepts of "participation" and "waiver". The "defense" must be "proved" by the stevedore (179a). It is small wonder that jurors rarely find it proved. It is doubtful that they understand the concept, even when it is explained by an articulate judge like Judge Higginbotham.

8. But compare *Albanese v. N. V. Nederl. Amerik Stoomv. Maats.,* 392 F. 2d 763 (2d Cir. 1968), recently reversed by this court, current docket No. 379, 37 L. W. 3150. The *Mortensen* formula would not work in the instant case. Nothing the ship did either prevented or seriously handicapped the stevedore from putting hard hats on his longshoremen. Therefore, under the *Mortensen* test indemnity would be owing even if, in the jury's view, the failure to wear a hard hat, although a breach of warranty, had nothing whatever to do with the accident and little to do with the extent of damages.

the dispute as to "relative fault" without the necessity of indulging in circuitous legal fictions which because of their complexity serve to dump the ultimate liability on the stevedore.

This court should seriously consider whether the lower courts have not carried to unnecessary and harmful lengths the implied promise spelled out in the *Ryan* case. The key words in *Ryan* were that the stevedore impliedly agreed to a

> ". . . discharge of foreseeable damages *resulting to* the shipowner from the contractor's improper performance . . .". 350 U. S. at page 129. (Emphasis supplied.)

The lower courts universaliy hold that "indemnity" means all or nothing at all. Why is that necessarily so? Why, if the fact-finder decides that the stevedore's breach of warranty contributed 10% to the ship's liability, should he not decide that the "damages resulting" from the breach are 10% of the shipowner's total damages?[9] That is hardly a shocking idea. It does no violence to the *Ryan* doctrine. If this court will review the problem, it may well decide that none of its decided cases require the current extremes in this field, that admiralty law is versatile enough to mold its doctrines to fit waterfront reality, and

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9. The following hypothetical demonstrates how ridiculous the all-or-nothing rule gets: a longshoreman falls through an uncovered hatch. The jury finds the ship negligent and the longshoreman 10% contributorily negligent. The damages are reduced 10%. Now, it appears that the ship is called upon to pay only those damages resulting from its own negligence. But no! The ship will surely argue that the longshoreman's negligence is "imputed" to his employer, that such imputed negligence is itself a breach of warranty and that the ship can therefore recover all of its damages from the stevedore-employer even though the latter had nothing to do with the accident. See *Lusick v. Bloomfield Steamship Co.*, 355 F. 2d 770 (5th Cir. 1966).

that a new direction is both necessary and possible, necessary to achieve a just balance between the competing interests and possible without doing violence to present law.

6. Actions for Personal Injury, Pure and Simple, are Barred by the Longshoremen's Act.

This Court should also consider whether the lower courts are now permitting recovery by ships, in situations not strictly within the scope of *Ryan v. Pan Atlantic,* 350 U. S. 124 (1956), even though recovery is flatly prohibited by Section 5 of the LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 44 Stat. 1426, 33 U. S. C. § 905. That section provides in part:

> "The liability of an employer prescribed [in this Act] shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury . . ."

In the indemnity cases in this Court, there was a breach of warranty quite apart from the personal injury involved. In *Ryan* the ship's cargo was improperly stowed; in *Weyerhaeuser*[10] a shelter was constructed in a faulty way; in *Crumady*[11] the ship's rigging was torn loose; in *Italia*[12] a rope used to help tie down cargo broke. In each of those cases there was the rationale that the ship's suit against the employer was not "on account of [personal] injury" but was on account of the breach of warranty. The warranty gave rise to a cause of action independent of the personal injury. In *Ryan* the stevedore would have been

10. *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.,* 355 U. S. 563 (1958).

11. *Crumady v. Joachim Hendricks Fisser et al.,* 358 U. S. 423 (1959).

12. *Italia Soc. v. Oregon Stevedoring Co.,* 376 U. S. 315 (1964).

obliged to pay for restowing the cargo, in *Weyerhaeuser* for rebuilding the shelter, in *Crumady* for rerigging the ship, in *Italia* for resecuring the cargo. Perhaps it was legally sound in those cases to say that the personal injury aspect of the cause of action went only to damages. The suit, involving as it did a separate cause of action, was not "on account of" personal injury. However, that rationale is *not* available in this case. Take away the personal injury and there is no underlying cause of action at all. The sole cause of action, whether called a contract or a tort action, is bottomed on the injury to the longshoreman. This suit for indemnity *is* a suit on account of personal injury, pure and simple. Liability is prohibited by the Longshoremen's Act.

7. Deprivation of Jury Trial Should Not Be Permitted.

In his dissent in *Ryan* (350 U. S. pp. 144-47), Mr. Justice Black warned of threats to the adversary system inherent in the trial of these three-way suits for "indemnity". There is now emerging, at least on the Philadelphia scene, a situation which perhaps did not occur even to him.

Counsel for a shipping company is caught in a square conflict of interest in each of these cases. If he defends vigorously against the longshoreman's action, he may win the lawsuit but his client will probably have to pay all the expenses of the trial. If, however, he loses the principal lawsuit for a reason that would make the stevedore liable over for "indemnity", under the current all-or-nothing approach (which, hopefully, this court will re-examine, *supra*, pp. 19-20), his client will get back the entire judgment plus counsel fees and expenses. So his client's real interest is to *lose* the principal case on facts indicating a substandard performance by the stevedore.

When both the plaintiff and the defendant agree on the truth of underlying facts in a lawsuit, the overwhelming probability is that the fact-finder will find the facts that way. Therein lie the seeds for the final destruction of the LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 44 Stat. 1426, 33 U. S. C. § 905. To be realistic about it, the stevedore is no longer an employer whose liability has been set by an Act of Congress; he is now litigator with a most distasteful alternative. He can take over the defense of the ship's case from the outset, or he can run the risk of being caught at trial with both the plaintiff and the defendant agreeing that the ship was indeed unseaworthy but that he, the stevedore, helped make it so.

If the stevedore is lucky enough to spot the squeeze, he has a potential weapon to combat it. The law is clear enough. If an indemnitee fails to defend the principal action in "good faith", the findings made therein do not bind the indemnitor, and the right to indemnity may be defeated.

> ". . . any act on the part of the indemnitee which materially increases the risk, or prejudices the rights, of the indemnitor will discharge the indemnitor under the contract of indemnity." *United States Fidelity & Guaranty Co. v. Putfark,* 180 La. 893 (1934), as quoted and relied upon in *Hern v. St. Paul-Mercury Indemnity Co.,* 262 F. 2d 526, 529 (5th Cir. 1959).

See also *Grummons v. Zollinger,* 341 F. 2d 464 (7th Cir. 1965); *Barber-Green Co. v. Bruning Co.,* 357 F. 2d 31 (8th Cir. 1966).

The potential weapon is an illusion if the courts refuse to let a party use it.

In the present case the stevedore raised the issue of good faith during the trial. Not until then did it become

evident that the ship was going to offer no defense and was going to work wtih the plaintiff (84a). The correct procedural motion was made, a motion to amend the answer to the third-party complaint to add the defense of lack of good faith (78a). Counsel informed the court that he was prepared to go to the jury on that issue on the state of the record as it then was, believing that the jury would decide that the ship's failure to present any defense at all about the condition of its stow was, in the jury's view, a failure to defend in good faith (80a-81a). The motion to amend was denied. The jury was not to consider "whimsical, factual testimony" (85a). Thereupon, the next procedural motion was made, a motion to continue the third-party case to develop more evidence on the ship's good faith or lack of it. That motion also was denied (85a-86a). After the adverse verdict, motions for judgment n.o.v. and for a new trial were filed (199a-202a). Then, the following motion, duly authenticated, unanswered, and therefore true for the purposes of adjudicating the stevedore's rights, was filed (235a-36a):

> MOTION UNDER RULE 60(b) FOR A NEW TRIAL BECAUSE OF AFTER-DISCOVERED EVIDENCE.
>
> In further support of the motion for new trial heretofore filed by third-party defendant (the stevedore), the stevedore now moves for a new trial because of after-discovered evidence. In support of its motion it states:
>
> 1. Throughout the pre-trial procedures counsel for the ship had asserted that nothing was improper about the stow of sugar.
>
> 2. Relying on the ship to produce at trial, in the defense of the claim of unseaworthiness, the evidence

to support the ship's pre-trial position, the stevedore, which was not joined as a party until after the pre-trial conference,[13] neither requested nor obtained leave to conduct discovery to ascertain what the evidence was.

3. During the trial it became apparent that the ship was going to produce no such evidence.

4. The stevedore moved for a continuance of the third-party case so that it could properly prepare the defense, which never appeared until the trial was in progress, that the ship was not defending the claim of unseaworthiness and that its own conduct precluded indemnity for the liability created thereby. The motion was denied.

5. The stevedore filed a timely motion for new trial asserting, inter alia, that the refusal of its motion for continuance was error.

6. The stevedore also filed a motion under Rule 60(b) requesting that it be relieved from the effect of the judgment.

7. The court permitted some discovery by the stevedore, in the course of which the ship produced statements of witnesses, which are now on file as part of an affidavit submitted by the ship's counsel,[14] and a

13. The Standing Order of October 23, 1958 of the District Court provides in part: "No . . . discovery . . . will be permitted after the pre-trial except by the permission of the Court to prevent manifest injustice . . ." In the courts of the Third Circuit statements of witnesses are not discoverable absent a showing of "good cause." *Alltmont v. United States*, 177 F. 2d 971 (3rd Cir. 1949).

14. Compare the testimony at trial, and the statement of the ship's lawyer to the jury that he agreed the sugar was hard and had known it ever since the accident (146a-147a) with the statements he had in his file but never used at trial (223a-234a).

statement about the accident prepared by the ship's Master. In that report the Master stated: "At that time, the condition of that hatch was in good order and there was nothing which could be the cause of the accident."

8. One of the witnesses from whom the ship had a statement has been interviewed by an investigator for the stevedore whose affidavit is submitted herewith, Exhibit "A". [238a]

9. Even this limited discovery demonstrates that there was a clear issue whether the sugar in the hold was as "hard as concrete."

10. Even this limited discovery demonstrates a clear issue whether the defense of the unseaworthiness claim by the ship was a fair and reasonable one.

11. Even this limited discovery demonstrates a clear issue whether the stevedore has unjustly been held liable on an indemnity claim without an adequate opportunity to test the truth of a key fact upon which the ship's liability was predicated, that the sugar was "hard as concrete".

WHEREFORE, the stevedore requests a new trial with a reasonable time beforehand to investigate and conduct discovery.

The motion for judgment n.o.v. and for a new trial on this "good faith" issue were denied by the trial judge. He said the stevedore was not "prejudiced" (19 app). The Court of Appeals affirmed. The rulings were "discretionary" (9 app). The motion quoted above was denied without opinion by the District Judge (248a). The Court of Appeals affirmed. It was not after-discovered evidence "in the legal sense" (9 app).

The end result of all these rulings has been a denial to the stevedore of a Constitutional right. If the third-party action here was truly an *indemnity* suit, not just an indirect way of imposing liability against a stevedore-employer in favor of his employee, the stevedore was entitled to a trial on the issue of good faith. No judge has held that the stevedore's view of the substantive law is wrong. No judge has held that the stevedore's counsel failed to take all procedural steps that could conceivably have been taken to protect his client's rights. And yet there has been *no trial on a fundamental fact issue*. Did the ship defend in good faith? The stevedore thinks not. If he is given the *jury trial* the Constitution guarantees him, it will be for the jury to say whether he is right. The writ should be granted as an assurance that a citizen's right to a jury trial, especially when his complaint is directed at the fundamental fairness of the system by which his rights are determined, should never be brushed lightly aside.

CONCLUSION.

Since 1956 the plight of the stevedoring companies has grown steadily worse.[15] The law moulded by the lower courts has greatly favored the shipping companies, and has pyramided the reasonably straightforward legal principle announced by a majority of this Court in *Ryan* into a set of judge-made rules which for the most part deprive the stevedore of his most fundamental right, the right to a fair trial of all fact issues.

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15. It has reached the point where many companies face economic extinction. In 1956 there were about two dozen stevedoring companies in the Port of Philadelphia. Today there are slightly over one-half that number, and they are on the decline. Perhaps application in the Third Circuit of the doctrine of *Ryan v. Pan Atlantic Corp.*, 350 U. S. 124 (1956), is not *the cause* of the decline. Undoubtedly it has been *a contributing cause*.

The writ should be granted.

Respectfully submitted,

F. Hastings Griffin, Jr.,
Attorney for Petitioner.

Of Counsel:
Dechert, Price & Rhoads.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17113

CLINTON GILCHRIST

v.

MUTSUIA SEMPAKU K. K.
(*Defendant and Third-Party Plaintiff*)

v.

JARKA CORPORATION
(*Third-Party Defendant*), *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 27, 1968

Before: BIGGS, GANEY and FREEDMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 31, 1968)

By GANEY, *Circuit Judge.*

Plaintiff, a longshoreman, obtained a verdict against the defendant-shipowner for either its negligent conduct or

the unseaworthiness of the Matsudasan Maru, a ship upon which he was injured during the unloading operation of bulk sugar. The shipowner in turn recovered a verdict for indemnity against the third-party defendant stevedoring company, plaintiff-longshoreman's employer at the time he was injured. The same jury returned both verdicts. An amount, agreed to by the shipowner and the stevedoring company, was added to the judgment of indemnity. The stevedoring company appeals from the judgments denying its motion for judgment n.o.v. and its motions for a new trial, and the awarding the shipowner its expenses for defending the principal action.[1]

At the trial, lasting seven days, there was evidence that the hold of the ship in question carried approximately 1,300 tons of bulk sugar and that it was unloaded by means of a large clamshell crane working in a vertical plane. When the loose sugar in the sides of the hold became inaccessible to the jaws of the crane, longshoremen pushed it to the center of the hatch with bulldozers. When the major portion of the loose sugar was removed from the hold, a gang of longshoremen was sent into the hold to sweep and shovel up the remaining sugar on the floor and scrape the sugar which had caked on the bulkheads. The plaintiff-longshoreman, Clinton Gilchrist, was injured when a scraper fell from the hands of one of his fellow workers and struck him on the head. Gilchrist testified, on cross-examination by counsel for the stevedoring company, that if the sugar had been unloaded and scraped in stages, the longshoremen would not have been required to reach as high as they did in order to scrape the caked sugar from the sides of the ship. There also was evidence that the scraper which struck Gilchrist was dull and shorter than

1. The reasons given by the district court for denying the motion for judgment n.o.v. and the first motion for a new trial appears in a Memorandum Opinion at 266 F. Supp. 961 (E. D. Pa. 1967).

the others, and that the longshoremen in the hold did not wear helmets.

From this evidence the jury could have found: (1) The ship was negligent or unseaworthy, or both, because when it was turned over to the stevedoring company, its loading was such as to permit sugar to cake on the bulkheads; (2) The stevedoring company was negligent in unloading the sugar in the manner that it did, such as (a) scraping the caked sugar from the bulkheads, (b) lowering the level of the sugar to such a depth before ordering the workers to scrape the sides, (c) failing to inspect the scrapers and requiring the longshoremen to use sharp scrapers with sufficient length handles, (d) requiring the men to work too close together, and (3) failing to require the longshoremen to wear protective headgear.

The stevedoring company maintains that the jury could have concluded that the conduct of the shipowner in turning over to the stevedoring company a ship with caked sugar on its bulkheads was the basic or real cause of plaintiff-longshoreman's injury, even though that same body might have found that the stevedoring company's conduct was a substantial factor in causing the injury. If the jury came to these conclusions, the argument runs, it had no alternative but to find for the stevedoring company on the issue of indemnity, and the jury should have been so instructed. The trial judge did not misapply the substantive law of indemnity in refusing to charge in this vein. See *Crumady v. The J. F. Fisser*, 358 U. S. 423, 428-429 (1959); *Italia Soc. v. Oregon Stevedoring Co.*, 376 U. S. 315, 320-321 (1964); *Johnson v. Sword Line, Inc.*, 257 F. 2d 541, 545 (C.A.3, 1958).

The stevedoring company also argues that the jury could have found that on the day plaintiff-longshoreman was injured, it performed the unloading operation in the usual manner, which was reasonably proper, and there was

nothing unusual until a longshoreman tried to chop away at the caked sugar, and the scraper was not sharp enough to cut into the unforeseeably latently hard bit of sugar. The fault with this argument is that no evidence was produced that the caked sugar was unforeseeably hard.

The stevedoring company also claims that the charge on causation was wrong. The trial judge told the jury that the shipowner is entitled to indemnity if they found that the unseaworthiness of the ship or the negligence which caused the shipowner to be liable was "brought into play" by the stevedoring company's breach of warranty of workmanlike service. He also told the jury that it should find for the shipowner if they concluded that the stevedoring company's breach of its duty of workmanlike conduct "was one of proximate cause of the injury [to plaintiff-longshoreman] and caused the liability of the shipowner." In this connection he told the jury to bear in mind the definitions given in his charge in the principal action where "proximate cause" was defined in part as being such conduct "as to lead reasonable men to regard it as a cause." Because of this charge the stevedoring company maintains that the jury was told that no matter how much they thought the shipowner's liability was in fact caused by the ship itself, they should nevertheless give the shipowner indemnity if the stevedoring company's breach of warranty contributed to that liability even if it were as little as five to ten percent.

Counsel for the stevedoring company did not object to the use of the term proximate cause or its definitions in the charge either in the principal action [2] or in the third-party

2. Contrary to the position taken by counsel for the stevedoring company at the trial, his client was in the principal action, and he could have interposed any objection to the charge which the shipowner could have made. See Rule 14 of the Federal Rules of Civil Procedure concerning third-party practice; *Lecklikner v. Transandina Companio Naviera, S. A.*, 390 F. 2d 179 (C. A. 3, 1968).

action. The jury had already found in the principal action that the shipowner was liable to the injured plaintiff-longshoreman. This liability stemmed only from the conduct of the stevedoring company. Even if the jury found that the caked sugar made the ship unseaworthy, this condition could not have injured the plaintiff-longshoreman unless it was brought into play or acted upon by the longshoremen. Consequently, the issues remaining to be decided by the jury were: (1) Did the stevedoring company breach its warranty of workmanlike service, and (2) Was there any conduct on the part of the shipowner which was sufficient to wipe out its right to indemnification. The stevedoring company should not be heard to complain of a portion of a charge which was more favorable than that to which it was entitled.

Next, the stevedoring company complains about the charge on latent condition. The trial judge told the jury that a shipowner can recover indemnity from a stevedoring company for its breach of warranty of workmanlike service even though the defect causing the injury was latent and the stevedoring company was without fault. The reason for its objection is that such a charge was inapplicable to the indemnity action. As pointed out by counsel for the stevedoring company, the only possible latent condition in the case was the degree of hardness in the caked sugar on the bulkhead, and on this factual issue evidence was lacking. The scrapers which the stevedoring company brought aboard the ship may have been too dull or to short for the purpose for which they were to be used, but such defects were open to view and not latent. We agree that this portion of the charge was unnecessary.[3] However, we are of

3. Apropos the stevedoring company's objection on this point, counsel for the shipowner informed the trial judge: "I would have no objection to telling the jury there was no latent condition here. I think the law in *Italia* [*Italia Soc. v. Oregon Stevedoring Co.*, 376 U. S. 315] still applies as a general principle of law."

the opinion that the stevedoring company was not prejudiced by such reference when the charge is considered in its entirety. In summarizing the situation to the jury, the trial judge said:

> ". . . The shipowner's negligence is not fatal to recovery against the stevedore in this area of contractual indemnity, and thus there is no application of any theory of primary or secondary negligence. A shipowner can recover from a stevedore for breach of warranty even though the [defect] causing the [injury] was latent, and the stevedore was without fault. The stevedore's implied warranty of workmanlike performance is sufficiently broad to make him liable where there is a failure to furnish reasonably safe equipment pursuant to its contract with the shipowner notwithstanding the fact that the stevedore was not negligent.
>
> "Now let me give you an example of what I mean. Let's take the cable case again. Let's assume a stevedoring company brings onto a ship a cable to lift 3 tons and when it looked at it and inspected it in a reasonable manner they would have reason to believe that the cable would in fact, lift 3 tons, but when it lifted 3 tons it snapped in the center and then only after it was broken it became obvious that some of the internal strands were defective . . . . The stevedoring company was not negligent because they inspected it, but, nevertheless, they could be liable because the cable was not reasonably safe equipment to do the job it was intended to be used for."[4]

4. In summarizing again, the trial judge said to the jury: "The stevedore's implied warranty of workmanlike performance is sufficiently broad to make him liable where there is a failure to furnish *reasonably safe equipment* pursuant to its contract with the shipowner notwithstanding the fact that the stevedore was not negligent." (Emphasis added.)

We can construe this portion of the charge in the light that the trial judge was telling the jury to what extent the law goes in permitting recovery of indemnity against a stevedoring company by a shipowner and not as specifically referable to the facts of this case. Since there was no evidence of any latent defect in the scraper brought aboard ship by the stevedoring company, the jury could not have been misled by this discussion. Thus the effect of this portion of the charge was to inform the jury that if they believed that any of the equipment supplied by the stevedoring company was not reasonably safe for the purpose for which it was intended, the stevedoring company could be held liable to the shipowner for indemnity, even though the former was not negligent in discovering the defect.

The stevedoring company claims that the trial judge's failure to tell the jury that the shipowner owes the stevedoring company a duty to supply it with a vessel reasonably free of defects was reversible error. We disagree. The shipowner is not deprived of its right of indemnity by the fact that there may have been an improper stow. See *Italia Soc. v. Oregon Stevedoring Co., supra,* 376 U. S. 315, 323; *D/S Ove Skou v. Herbert,* 365 F. 2d 341, 348-350 (C.A.5, 1966).

The stevedoring company complains of the trial judge's use of the words "brought into play". The trial judge told the jury that the shipowner is entitled to indemnity if they found that

> ". . . the fault of the stevedoring concern brought the unseaworthiness of the vessel into play and the fault amounted to a breach of warranty of workmanlike service. Or, similarly, if you found that the negligence which caused the liability of the shipowner was brought into play by a breach of the warranty of workmanlike service—the key words are 'brought into play'

> —in such circumstances the vessel owner may similarly recover."

When the trial judge repeated in substance this portion of the charge, counsel for the stevedoring company objected "to the use of the words 'brought into play' without any explanation of those words." At this point, the trial judge asked him how he defined them. Counsel replied that in the particular confines of this case he didn't know how to define them, and added, "I don't think it is an applicable charge."

Here again that portion of the charge claimed to be erronoeus was not validly objectionable. Whatever condition or situation was the basis for liability of the shipowner to the plaintiff-longshoreman, the condition was brought into play or the situation was brought about by the stevedoring company. As we have mentioned earlier herein, the issue before the jury in the indemnity action was whether the stevedoring company had breached its warranty of workmanlike service. The stevedoring company was not harmed by this portion of the charge.

In the midst of their deliberations, the jury forwarded a note to the trial judge asking him who would be liable if they felt that both parties were at fault. He obliged by giving addition instructions. The stevedoring company objected to the additional charge on the ground that it did not answer the jury's question because allegedly it did not permit the jury to "come to grips" with the question as to which party is more at fault, the condition of the load or the method of the work followed by the longshoremen.

This objection brings into bold relief the stevedoring company's main difficulty in this case. The law of indemnity is not concerned with the comparison or degree of fault of the shipowner and the stevedoring company. The trial judge explained to the jury several times that if they found that the stevedoring company had performed its contract in

a workmanlike manner the shipowner had no right to recover against the stevedoring company. He informed them in substance that the shipowner could not recover unless the conduct of the stevedoring company amounted to a breach of warranty of workmanlike service. He also told them that the right of indemnity could be defeated if they found that there had been inducement or participation on the part of the shipowner. In so charging the trial judge committed no error requiring a new trial.

The stevedoring company complains of the court's denial of its motion to file a supplemental pleading so as to allege, as a defense to the indemnity claim, that the shipowner was not acting in good faith, and its refusal thereafter to grant it a continuance. We are satisfied that these motions were within the trial judge's discretion and were properly denied.

Its motion for a new trial based on after discovered evidence was also properly denied. The evidence referred to in the motion was not in the legal sense "after discovered evidence." See *Brown v. Pennsylvania R. Co.*, 282 F. 2d 522 (C.A.3, 1960); *Gibson v. International Freighting Corp.*, 173 F. 2d 591, 592-593 (C.A.3, 1949); *Kender v. General Expressways, Ltd.*, 34 F.R.D. 237 (E.D. Pa. 1963). Also see *United States v. Rutkin*, 208 F. 2d 647 (C.A.3, 1953).

Finally, the stevedoring company complains of the award of an additional jury trial giving the shipowner an opportunity to offer evidence on the amount of its defense expenses about which it offered no evidence at the trial. After the jury had returned its verdict on March 24, 1966, and had been discharged, counsel for the victorious shipowner asked that "the judgment be formed to include the shipowner's counsel fees and expenses in defending the principal action." The stevedoring company objected on the ground that no evidence had been presented on the

amount of the fees and expenses and their reasonableness. On March 28, 1966, a judgment on the verdict was entered. The judgment contained the notation: " . . . the third-party plaintiff to have right of indemnity against third-party defendant for the amount paid to plaintiff and costs, (the Court reserves its ruling on the third-party plaintiff's request for attorney's fees and expenses) . . . ." The shipowner did not file a motion with respect to the above until April 19, 1966, when it filed a paper entitled "Motion for Entry of Judgment" and in which it asked, in addition to the amount it had paid plaintiff-longshoreman without interest, for costs, and counsel fees and expenses set out in the motion. On April 3, 1967, over a year after judgment was entered on the verdict in the indemnity action, the district judge signed an order directing counsel to make every reasonable effort to come to an agreement on the question of counsel fees, and should they be unable to agree, "a separate jury trial on that issue in accordance with 42(b) of the Federal Rules of Civil Procedure will be scheduled in this action." In the memorandum opinion which followed on April 26, 1967, the judge did not explain why he signed the order for a partial trial except as follows:

> "This Memorandum Opinion is filed in accordance with that Order [of April 3, 1967] and I am still waiting to hear, formally, from counsel, whether they can agree on the issue of counsel fees. This issue has been severed for a subsequent trial, if necessary, should the parties be unable to come to agreement on the amount of legal fees and related costs to be recovered in the indemnity action."

On November 20, 1967, the issue of counsel fees was called for trial. Prior to trial counsel agreed that the shipowner had incurred an attorney's fee and expenses in the amount

of $3,751.03, and that judgment be entered for this additional amount. On November 24, the following order and judgment was entered:

> "At the call of the trial on the issue of counsel fees and expenses, counsel for third-party defendant duly objected to the trial's being held on the grounds (1) that the judgment for indemnity, in accordance with third-party defendant's post-trial motions, was erroneously entered, and (2) that the court lacked power or was in error in ordering the post-verdict jury trial of counsel fees and expenses. He stated, however, that subject to those objections his client, in order to avoid the expense and inconvenience of the jury trial which has been ordered, would not dispute that defendant incurred reasonable counsel fees and expenses of $3751.03. Counsel for defendant agreed that defendant would limit its claim to that amount in compromise of its claim of $4412.98. In accordance with my prior ruling the objections of third-party defendant are overruled. Accordingly I order the following:
>
> "JUDGMENT.
>
> "The clerk is directed to enter judgments in favor of Mitsui Sempaku K. K. and against Jarka Corporation (1) in the amount of $27,556 with interest from April 19, 1966, and (2) in the amount of $3751.03."

In the case of *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F. 2d 673, Judge Hastie, now Chief Judge of this Court, said at p. 674: "If conduct of [the stevedoring company] in violation of its warranty to [the shipowner] was the *sole* responsible cause of [the longshoreman's] injury, as the libel alleges, the expenses to which [the shipowner] is subjected in defending [the longshoreman's] suit against it to recover for that injury is an

element of damages caused by the [stevedoring company's] breach of warranty, even if [the shipowner] succeeds in defeating [the longshoreman's] claim." (Cited cases omitted and emphasis added.) There has been no showing in the actions here involved that the conduct of the stevedoring company was the sole responsible cause of the plaintiff-longshoreman's injury. Therefore, the shipowner was not entitled to recover the expenses to which it was subjected in defending the plaintiff-longshoreman's action against it from the stevedoring company. Hence we need not determine whether the verdict was res adjudicata on the defending expense issue and whether the district court had the power to sever that issue and grant a separate jury trial on its own motion, and even though it did have such power in this action, whether it had to be exercised within ten days from the entry of judgment on the verdict.

The stevedoring company's agreeing to the amount of the shipowner's defense expenses and the entry of judgment for that amount if it should turn out that the shipowner is entitled to be reimbursed for those expenses does not render the issue moot. The position of the stevedoring company is made clear by the recital in the judgment of November 24, 1967.

Accordingly, the judgments of the district court denying the motion of the stevedoring company (Jarka Corporation) for judgment n.o.v. and its motions for a new trial will be affirmed; and the second part of the judgment of November 24, 1967, awarding the shipowner (Mutsuia Sempaku K. K.) an additional amount in the sum of $3,751.03 will be reversed.

MEMORANDUM OPINION.

(E. D. Pa.)

HIGGINBOTHAM, *J.* April 26, 1967.

The above captioned action was brought by the plaintiff, Clinton Gilchrist, for injuries sustained by him in August, 1961 while employed by Jarka Corporation to unload sugar from the defendant ship. The ship, in turn, impleaded Jarka as a third-party defendant.

Gilchrist was struck in the head by a sugar scraper, being used by a fellow employee next to him, as they were scraping sugar from the bulkhead of the ship. Plaintiff recovered a judgment against the ship. The ship, in turn, recovered that amount as indemnity from Jarka. The third-party defendant has now filed motions for judgment n.o.v. or, in the alternative, a new trial.

On a motion for a new trial or for judgment n.o.v., the facts must be taken in the light most favorable to the prevailing party. Plaintiff was struck on the head by a scraper being used by an associate who was working three or four feet away. This associate, a Mr. Mooreman, had complained to his foreman that the scraper was dull (N. T., p. 133) but was not supplied with another (N. T., p. 150). The ship's boss, Mr. O'Brien, testified that his ship was similar to all other sugar ships turned over to him for discharge (N. T., pp. 412-413). On cross-examination, the plaintiff testified that there was nothing wrong with the way the sugar was stowed; however, that through the fault of Jarka's hatch bass the sugar was cut too low by the "clam digger" and the men were forced to work at a level too low for the scraping operation (N. T., pp. 182-186).

In its motion for a new trial, the third-party defendant raises issues which have been grouped by it in three broad areas. They are: (1) errors stemming from the substantive law of indemnity; (2) those arising out of the "pro-

cedural duty" which an indemnitee owes to an indemnitor; and (3) those having to do with the exclusion of alleged relevant evidence.

DISCUSSION.

I.

The third-party defendant (hereafter Jarka) contends that the Court when charging the jury on the question of liability, committed error in that tort principles of causation were employed to define what was essentially a contract problem. Jarka relies on *Italia Soc. v. Oregon Stevedoring,* 376 U. S. 315, 84 S. Ct. 748 (1964) to sustain its contentions:

> It further urges that negligence on the part of the stevedore company or its employees was present in all the above cases, and that the Court characterized the warranty in post Ryan decisions as one entailing an obligation to perform with reasonable safety and reasonable competency. However, the stevedore's obligation established in Ryan was not merely an escape from the no-recovery consequences of Halcyon, as is evidenced by the fact that recovery of contribution between joint tortfeasors and recovery of indemnity for breach of warranty proceed on two wholly distinct theories and produce disparate results . . . Recovery in contribution is imposed by law and is measured by the relative fault of the joint tortfeasors or shared equally between them, . . . ; *while recovery in indemnity for breach of the stevedore's warranty is based upon an agreement between the shipowner and stevedore and is not necessarily affected or defeated by the shipowner's negligence, whether active or passive, primary or secondary.* (376 U. S. 316 at pp. 321-22; emphasis added.)

It is true that the Supreme Court has held that tort principles are not applicable in the area of ship-stevedore indemnification, however, I fail to see that the charge given in this case deviated from the holdings of that Court. The following passage from Jarka's brief is relevant here:

> For the stevedore's breach of warranty to make him responsible for indemnity, the liability of the ship must have been a result of the breach, or the breach must have 'led to' the ship's liability. Ultimate liability is to rest 'on the company whose default caused the injury'. This is not, and by definition cannot be, combination stuff. (at p. 9)

Accordingly, when I charged the jury, that if the stevedore breached its warranty, and if that breach was a proximate cause of the plaintiff's injury, the ship was entitled to indemnification, that language was clearly consistent with the doctrine as defined by the Supreme Court. If a breach "led to", or is the cause of an injury it is clearly the proximate cause of said injury.

The Supreme Court in *Ryan v. Pan-Atlantic Corp.*, 350 U. S. 124 (1956) recognized that the mere fact that a ship was negligent would not, of itself bar indemnification by a stevedore who breached its warranty of workmanlike service. Thus, although the ship, in the instant case, may have been negligent it was not barred from a recovery where the stevedore's breach of its warranty was a cause of the injury sustained here.

The core of Jarka's contentions on this point lies in its disagreement with the Court's charge on latent defects. The jury was charged that, under certain circumstances, a shipowner can recover from a stevedore for breach of warranty even though the defect was latent, and, to that

extent, the stevedore was without fault.[1] Immediately after that statement I continued to charge the jury as follows:

> "The stevedore's implied warranty of workmanlike performance is sufficiently broad to make him liable where there is a failure to furnish reasonably safe equipment pursuant to its contract with the shipowner notwithstanding the fact that the stevedore was not negligent.
>
> "Now let me give you an example of what I mean. Let's take the cable case again. Let's assume a stevedoring company brings onto a ship a cable to lift 3 tons and when it looked at it and inspected it in a reasonable manner they would have reason to believe that the cable would, in fact, lift 3 tons, but when it lifted 3 tons it snapped in the center and then only after it was broken it became obvious that some of the internal strands were defective and the cable broke. The stevedoring concern was not negligent because they inspected it, but, nevertheless, they could be liable be-

1. Unfortunately, the actual language used was "A shipowner can recover from a stevedore for a breach of warranty even though the injury causing the defect was latent and the stevedore was without fault." (N. T., p. 50—Charge of the Court.) While grammatically the word "defect" should have been used where the word "injury" was, and "injury" should have been used where the word "defect" was, counsel did not object to my inadvertent interposition of the words injury and defect. Counsel's objection was to the jury being informed of a shipowner's right to recover under certain circumstances even if the defect was latent and the stevedore was without fault. Counsel made no objection as to the substitution of the words "injury" and "defect":

> "MR. GRIFFIN: I take an exception to Your Honor's charge on the latent condition to which the stevedore could be liable without fault on which it is not applicable to this case at all. . . . Latent conditions in ships' equipment are quite different from the Italia case which were latent conditions in the stevedore's equipment." (N. T., p. 58—Charge of the Court.)

cause the cable was not reasonably safe equipment to do the job it was intended to be used for."

Jarka argues that the Court misinterpreted the language of *Italia, supra*, on this point. In *Italia*, the latent defect existed in a rope supplied by the stevedore, whereas in the present case, the defect—if it indeed was latent—existed in the condition of the sugar in the ribs of the ship. *Italia* should not be read so narrowly. Even where the "latent defect" was in the ship, if the stevedore should have been aware of its existence by virtue of its operations, and an injury resulted, a jury could validly find that its warranty of workmanlike service had been breached. The Supreme Court in *Italia* held as it did because it thought that the stevedore was in a superior position to detect the existence of the defect and prevent injury. This is the key. Thus, the fact that the sugar was already in the ship when stevedoring activities began would not insulate Jarka, if it was best situated to "adopt preventive measures and thereby reduce the likelihood of injury,"—and the jury could have so found.

Jarka next contends that there was error in the Court's instruction to the jury that the stevedore would be liable if its actions "brought into play" the unseaworthiness of the vessel which led to the plaintiff's injury. This was not error. The language in question was first used by the Supreme Court in *Crumady v. Joachim Hendrick Fisser, et al.*, 358 U. S. 423, 79 S. Ct. 445 and has been adopted subsequently, by many courts. See *Dziedzina v. Dolphin Tanker Corp.*, 361 F. 2d 120 (3 Cir., 1966). The language "brought into play" recognizes that there can be, and are, circumstances where a ship may be unseaworthy but nevertheless a higher burden is placed on the stevedore because it had a better opportunity to prevent an ensuing injury.

The language of the Court of Appeals for the Third Circuit in *Dziedzina,* on this point, is instructive:

> Here specifically it was incumbent upon the court to point out that knowledge of the unseaworthy condition in Dolphin did not defeat its right of indemnity against Atlantic. The court also had the duty to explain to the jury that even if the stevedore acts in a non-negligent manner, his warranty of workmanlike service is breached where such actions make the unseaworthiness of the vessel operative. These principles of Maritime Law are unique and distinct from the Common Law standards and for this reason, the District Court must be explicit; . . . The thrust of this point was aimed at making the jury aware that *the right of indemnity exists where a preexisting condition of unseaworthiness was brought into play by the action of the stevedore. The import of this point is obvious under the factual circumstances of this case. The jury should have been given the opportunity to decide whether or not it was the failure of Atlantic to properly instruct its employees to refrain from working in an obviously dangerous situation which was a contributory cause of this accident.* (361 F. 2d 120, at p. 123; emphasis added.)

The stevedore also argues that the Court committed error in its supplementary charge to the jury on the question of the relevant law when both the ship and the stevedore are at fault. The essence of the stevedore's argument is that by its charge the Court, in effect, ordered a directed verdict in favor of the ship. This assignment of error is without foundation. The jury was instructed that where both parties were at fault, if the stevedore's breach was a contributing cause of the injury it was liable to the ship.

The language of the Court of Appeals in *Dziedzina* clearly supports that instruction.

II.

Counsel for Jarka contends that the shipowner violated its procedural duty as an indemnitor to the indemnitee. I have canvassed the evidence adduced by the stevedore and cannot agree with its contentions. I find that the pretrial memorandum, filed on behalf of the ship, gave adequate notice to Jarka as to what defenses it should have been prepared to make, and what evidence it should have been prepared to refute. Nor do I accept the stevedore's arguments that the ship abandoned its defense of the action. The ship's position at trial, that the stevedore's actions were the cause of its unseaworthiness, was consistent with its posture before trial; consequently the stevedore was not prejudiced thereby.

III.

Finally, the stevedore argues that the Court's refusal to permit it to show that it had not been impleaded by the ship until four years after the accident, and to read interrogatories and answers to show its lack of notice of the claim, was error. I am satisfied that Jarka had sufficient notice of the claim against it. Its employees were aware of the accident and Jarka had clear access to them. Counsel was supplied with transcripts of discovery proceedings, and was not denied access to investigatory reports.

Insofar as evidence was introduced into evidence pertaining to the failure of Jarka to supply its employees with hard hats, the short answer is that such testimony was given by Jarka's own witness and there was no objection to that testimony. In any event, I find that such testimony was consistent with the allegations in the pretrial memorandum and complaint.

My Order of April 3, 1967, provided that:

"AND Now, this 3rd day of April, 1967, the motion of Jarka Corporation for judgment n.o.v., or in, in the alternative, for a new trial is denied.

"Counsel for the defendant and the third-party defendant are directed to make every reasonable effort to come to an agreement on the question of counsel fees in this action. Should they be unable to agree, a separate jury trial on that issue in accordance with Rule 42(b) of the Federal Rules of Civil Procedure will be scheduled in this action. Said trial would be scheduled before the end of the present court term. A memorandum opinion will follow this order.

"By THE COURT:

/s/ A. LEON HIGGINBOTHAM, JR., *J.*"

This Memorandum Opinion is filed in accordance with that Order and I am still waiting to hear, formally, from counsel, whether they can agree on the issue of counsel fees. This issue has been severed for a subsequent trial, if necessary, should the parties be unable to come to agreement on the amount of legal fees and related costs to be recovered in the indemnity action.

By THE COURT:

A. LEON HIGGINBOTHAM, JR., *J.*